Stephen Mocko
C/o PO Box 27
Eureka, MT (59917)
406-291-3688

IN THE SUPREME COURT FOR THE STATE OF MONTANA

Stephen Mocko, sui juris Petitioner, v. Justice Court #2, Lincoln County, Lincoln County Attorney, Respondent.	Case No: TK-2009-0000544 EMERGENCY PETITION FOR WRIT OF PROHIBITION AND/OR THE ALTERNATIVE WRIT OF MANDATE

Stephen Mocko, petitioner.) Affidavit of Testimony

State of Montana)
) ss.
County of Lewis and Clark)

I. PETITION FOR WRIT OF PROHIBITION

1.1 Comes now, Stephen Mocko, one of the people of Montana, (Petitioner) appearing under threat duress and the fear of losing life, limb, liberty or property, pursuant to MCA 27-27-102, having exhausted all other remedies, is not without bias and prejudice in the lower tribunal of the 19th District Court for naming Judge Prezaeu as a co-defendant in a counter claim, comes before this court to petition for relief in the form of Prohibition to prohibit the proceedings of the lower court of Justice # 2, in Lincoln County, State of Montana, in the above titled action or in the Alternative to Mandate the Lower Court to compel the County Attorney to produce Discovery requests and further actions stated herein. Any and all **emphasis** herein may be construed as added.

1.2 A judicial Determination mailed on the 30th of October 2009, and Notice and Demand for Abatement Supported by Memorandum, (Attached hereto as Exhibit A is incorporated and referenced as fully stated herein), was delivered by certified mail to the County Attorney and Officer Brad Dodson on the 18th of December, 2009. No response to subject matter.

1.3 Pursuant to the rules stated therein, (rule 301 of the federal rules of evidence and attending state rules), disputable presumption[1], 21-1-601(27) MCA. Acquiescence followed from a belief that the thing acquiesced in was conformable to the right or fact. County Attorney had an opportunity to rebut all of the Petitioners' presumptions, statements, and averment of fact and law stated therein.

1.4 The County Attorney was placed on notice of default, by notary Larry Wilke, on January 5th 2010, (Attached hereto as exhibit B and incorporated as fully sated herein).

1.5 County Attorney was noticed of a final default on January 8th 2010, (Attached hereto as exhibit C and incorporated as fully stated herein.)

1.6 A writ of praecipe to the clerk, against the County Attorney, notifying him he is in default, submitted on the 8th of January 2010, (Attached hereto as Exhibit D and incorporated as fully stated herein,) the clerk refused in violation of the duties of their office, to Petitioner's rights to due process and to have an unbias court.

1.7 After the clerk refused to issue the default notice in the praecipe, Petitioner issued a writ of Mandamus submitted on the 18th day of January 2010, (Attached hereto as Exhibit E and incorporated as fully stated herein), mandating the clerk to issue the default on the County Attorney. The clerk refused in violation of the duties of their office, to Petitioner's rights to due process and a speedy remedy.

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[1] "[I]t is a well-established maxim of law that 'acquiescence in error takes away the right of objecting to it.'" *Statev. Malloy*, 2004 MT 377, ¶ 11, 325 Mont. 86, 103 P.3d 1064 (quoting § 1-3-207, MCA).
Connally v. General Construction Co., 269 U.S. 385,391. Notification of legal responsibility is "the first essential of due process of law".
"Silence can only be equated with fraud where there is a legal or moral duty to speak or when an inquiry left unanswered would be intentionally misleading." *U.S. V. Tweel*, 550 F.2d.297.

1.8 Petitioner, after no answer from County Attorney or the court, filed with the court a challenge to jurisdiction and a motion to dismiss, (attached here to with Exhibit F and incorporated as fully stated herein, and the County Attorney's response (Attached with Exhibit F) , not rebutting all facts and law that petitioner brought to the point. Petitioner responded to the States response with a counter claim naming Marcia Boris, Brad Dodson, Stormy Langston, Bernard Cassidy, Bonita Cook, and Daryl Anderson as Defendants. Petitioner does not have a copy of the counter claim to present to you, yet assures it's on the court record (cert.Mail #70092820000702310O7). Petitioner has not served all defendants properly at this time, or moved it to the District Court because the amount is in excess of 7,000$ (U.S) and cannot be heard in the Justice Courts. Petitioner also filed a demand for LANGSTON to recuse herself alongside the counter claim. Petitioner is not the most skilled writer or communicator, yet, he knows, exercises and demands all of his rights to due process of law that is protected by the constitutions of the United States and of Montana.

1.9 Therefore, by the County Attorneys' failure to respond to and to deny Petitioners' Notice and Demand for Abatement, Petitioner invokes effect of failure to respond to and failure to deny, thus, the County Attorney consents to, admits to and grants the Notice and Demand for Abatement referenced above. Therefore, by the County Attorney's admission to Petitioner statements and charges contained within the referenced Notice and Demand for Abatement, the County Attorney admits to everything stated therein, including, but not limited to, the facts that the Notice to Appear and Complaint is an unlawful summons issued by an executive agency, the Petitioner was in his right to travel freely, the justice court provides no due process of law, has no jurisdiction over and no lawful case against Petitioner.

1.10 Further, by the County Attorney's lack of response and stating on the record that there is no authority for the County Attorney to have to deny, and rebut with particularity and specificity, all facts and law stated within the Notice and Demand to Abate, denies the laws of the United States and of this State, thus, perpetuating fraud upon the court.

1.11 Petitioner demanded for a Bill of Particulars identifying the jurisdiction, venue, nature and cause of the accusation so that Petitioner could mount an aggressive defense, in

Petitioner's Notice for Abatement. Petitioner never received such, amounting to a denial of due process of law.

> **Mont. Const. Art. II Section 24. Rights of the Petitioner.** In all criminal prosecutions the Petitioner shall have the right to appear and defend in person and by counsel; to ***demand the nature and cause of the accusation***;...

1.12 Petitioner petitioned the court for a request for disclosure, (attached here to and marked as exhibit G and incorporated as fully stated herein), mailed to the Justice Court # 2 and the County Attorney on the 18th of February 2010 along with a continuance for pre-trial until Petitioner received his discovery requests. Petition was granted in full, which the Petition states in part, "and further, a continuance, of the Pretrial hearing set forth above, until all Disclosure requests, attached hereto, are produced, and Interrogatories answered by the County Attorney, also on behalf of the State." Langston never informed the Petitioner that his petition for continuance was granted, therefore Petitioner, requested time off of work, traveled to Eureka Montana, showed up for the pre-trial date for March 2nd 2010 and then was informed that the continuance was granted. County Attorney was not present, thus resulting in bias and prejudice against Petitioner.

1.13 Langston then reissued another pre-trial date set for May 5th 2010, (attached hereto as exhibit H and incorporated as fully stated herein,) without Petitioner ever receiving one of his discovery and interrogatory requests. Petitioner wonders why these are being kept from him.

1.14 Petitioner remembers very clearly that Officer Brad Dodson had a video tape recording of Petitioners custodial interrogation. This is being suppressed from Petitioner as well.

1.15 Petitioner mailed in a motion to compel and sanction against the state and an order to show cause as to why the pre-trial and trial date were set in absence of the discovery requests, (marked as exhibit I and incorporated as fully stated herein). It was mailed to the justice court on the 20th day of April. This was denied as well by Langston, and there is no findings of facts and conclusions of law.

1.16 Petitioner mailed to the court on the 20th day of April 2010 a petition for summary judgment, (attached hereto and marked as exhibit J and incorporated as fully stated herein.

Petitioner does not have a copy of his signature, but assures it is in the court record). Langston denied this motion on her own accord and in violation of MCA 25-24 rule 6(c), which the same rules apply to the County Attorney, on Petitioners Notice and Demand for Abatement. Langston never allowed an answer brief.

1.17 Petitioner mailed, administratively, to the County Attorney's office a request for admissions on the 15th day of April 2010, (marked hereto as exhibit K and incorporated as fully stated herein,) wherein the County Attorney replied (exhibit L) with the fact that Petitioner is confused as to the difference between civil and criminal. Langston granted the County Attorney's motion, without having the request for admissions on file, and while Petitioners reply brief was in the mail on the way to the justice court for notice (attached hereto and marked as exhibit M and incorporated as fully stated herein). It appears that the same rules do not apply to the County Attorney's office as they do for the Petitioner. The County Attorney does not have to respond to Petitioners briefs. Petitioners briefs get denied before an answer to his briefs. County Attorney gets his granted before Petitioner gets the County Attorney's brief in the mail, the dates on these motions are well settled proof of this lawlessness.

1.18 Whether or not this proceeding is civil or criminal, Petitioner has no way of knowing with what is on the record. Petitioner demanded to know the nature and cause of the accusation, the adverse party has refused to inform Petitioner on the record, what the specific nature is. Further, as Petitioner has not been given the necessary information by County Attorney to assert what specific sections of the Montana Code are being applied to Petitioner, Petitioner has been forced to make certain "presumptive guesses" as to what statutory sections are being insinuated by the County Attorney, based upon the ambiguous charges written on the face of citation no. CB5610239, dated 10/20/2009, (exhibit N) and issued by the State. Therefore, Petitioner can only present arguments as follows.

1.19 The citation also fails to state with requisite specificity the nature of the charges being levied against the Petitioner. Petitioner asserts that it is impossible to determine from the ambiguous charges written on the face of the citation whether the charges are considered administrative, civil, or criminal in nature.

1.20 The citation also fails to state with requisite specificity under what lawful authority and statute(s) the Petitioner is being charged. The Petitioner cannot determine from the citation whether the charge arises under municipal ordinance or state law; and, if the charge does arise under state law, whether the specific law pertaining to the alleged charge is to be found within the Motor Vehicle Code, Administrative Code, Family Code, Property Code, Criminal Code, or any of the other various codes. The following case is from Washington State but equally applies, and you are to take judicial notice, to Montana under Article II section 24 of the Montana Constitution, supra.

> "Here, the citation contained a citation to the statute and the date, time and location of the offense. However, it did not contain the ***element of intent. Because the citation did not contain an essential element of the crime, it did not state a charge on which Robinson could be tried and convicted.*** The conviction must therefore be reversed and the case dismissed. Reversed and remanded for proceedings consistent with this opinion. Review denied at 116 Wn.2d 1003 (1991)." [2]
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> "We reverse because the informations did not allege a nonstatutory element of the offense; that the defendants acted with guilty knowledge, *i.e.*, an understanding of the identity of the product being delivered. [1] The information must apprise the defendant of the elements of the crime charged and the conduct of the defendant which is alleged to have constituted that crime. *State v. Kjorsvik*, 117 Wn.2d 93, 98, 812 P.2d 86 (1991) (citing *State v. Leach*, 113 Wn.2d 679, 689, 782 P.2d 552 (1989)). Under *Kjorsvik*, all essential elements of a crime, statutory or otherwise, must be included in the **charging document**. ...While the statute does not expressly include an intent requirement, in *State v. Boyer*, 91 Wn.2d 342, 344, 588 P.2d 1151 (1979), the court held that guilty knowledge is intrinsic to the definition of the crime of delivery. . . . Neither information alleged the defendants acted with guilty knowledge. ...[4] ***Since the informations are defective, the convictions obtained thereunder must be reversed and the charges dismissed.*** See *State v. Holt*, 104 Wn.2d 315, 323, 704 P.2d 1189 (1985). GREEN, C.J., and SHIELDS, J., concur." [3]
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> A Petitioner must be informed of the criminal charge he or she is to meet at trial and cannot be tried for an offense which has not been charged. *State v. Irizarry*, 111 Wn.2d 591, 592, 763 P.2d 432 (1988). ***It has long been settle law in this state that all essential statutory elements of a crime must be included in the charging documents in order to afford notice to an Petitioner of the nature and cause of an accusation against the Petitioner***. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991) recently held that ***nonstatutory essential elements*** must also be included in a charging document. . . . Our unanimous opinion in *Leach* stated:

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[2] See *State v. Robinson,* 58 Wn.App. 599, 606, 607 at [5], 794 P.2d 1293 (1990).

[3] See *State v. Kitchen*, 61 Wn.App. 911, 916-18, 813 P.2d 131 (1991).

In holding that ***a charging document which omits a statutory element of the crime charged violates a defendant's constitutional rights***, the court in *Holt* did not distinguish between misdemeanor and felonies, nor between complaints and citations. In applying the Holt rule, there is no logical reason to distinguish between complaints and citations or felonies and misdemeanors. ***If a misdemeanor citation or complaint omits a statutory element of the charged offense, the document is constitutionally defective for failure to state an offense and is subject to dismissal.*** . . . See also *State v. Pelkey*, 109 Wn.2d 484, 490, 745 P.2d 854 (1987) (court cannot sustain an interpretation of a court rule which contravenes the constitution); CrRLJ 1.1 ("These rules shall not be construed to affect or derogate from the constitutional rights of any defendant.") . . . The City of Seattle argues that since the "essential facts" are known to the defendant Wandler, a requirement that the citation include the statutory elements of the crime is unnecessary and unreasonable. ***This argument is not tenable because it assumes a defendant's actions always constitute the "essential facts", i.e., that the defendant is always guilty of the crime charged.*** . . . It is only fair that those Petitioner of all crimes, however minor, ***be informed of the elements of the charges against them before they decide to forgo a defense. We have repeatedly said that defendants should not have to search for the rules or regulations they are Petitioner of violating.*** *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991); *State v. Jeske*, 87 Wn.2d 760, 765, 558 P.2d 162 (1976)." [4]

"[T]he Sixth Amendment (U. S. Constitution) and Article 1, section 22 of the state constitution require that all the essential elements of a crime, both statutory and nonstatutory, be included in a charging document in order to afford the Petitioner notice of the nature and cause of the accusation." *Auburn v. Brooke*, 119 Wn.2d 623.

"The constitutional requirement that a charging document set forth all the essential elements of the crime charged applies to all types of crimes (felonies, gross misdemeanors, and misdemeanors) and to all charging documents . . ." *Id.*

"A misdemeanor or gross misdemeanor citation and or a criminal complaint used as a final charging document does not satisfy the constitutional requirement that a charging document set forth all the essential elements of the crime charged by stating the name of the crime . . ." *Id.*

"***[D]efendants should not have the burden of locating the code containing the crime of which they are charged and determining the elements of the crime from the proper code section.***" *Id.*

"The omission of a statutory element of a crime in any charging document, whether a felony information or a misdemeanor complaint, renders the document constitutionally defective and subject to dismissal." See *State v. Leach*, 53 Wn.App. 322

1.21 Petitioner is without bias and prejudice from the entire jurisdiction of Lincoln County. Attached hereto and marked as (exhibit O), are various Verified Criminal Affidavits sent

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[4] See *Auburn v. Brooke*, 119 Wn.2d 623, 836 P.2d 212 (1992).

to the 19th Judicial District court with a petition to convene a grand jury. Petitioner believes these crimes have been committed, yet leaves the trials and conviction, if probable cause is found, of said crimes to the duties of the state.

1.22 WHEREFORE, Petitioner has presented facts and law to support this Petition, and the Notice and Demand for Abatement with Memorandum in Support, signed by declaration, not rebutted or denied, given ample time and notice that if the County Attorney needed more time, to issue it in writing it would be granted by Petitioner, having respect for procedure and time constraints. Therefore, by all other exhibits contained herein, any court of competence and due process, taking full recognition of the facts and law presented by Petitioner and the fact that no controversy exists, that the Justice court has no jurisdiction, the Petitioner has been denied his due process rights, and pursuant to the presiding judge's oath to uphold the federal and State Constitutions, Petitioner respectfully petitions this court to issue a writ prohibiting the proceeding in the lower Justice court on the above entitled cause, and order to show cause to the County Attorney why the case should not be dismissed for estoppels by acquiescence, on Petitioners Notice and Demand for Abatement and Memorandum in support.

1.23 Further, Petitioner respectfully petitions this court to have a hearing for Stormy Langston to show cause why she can violate the rules of procedure, by further proceedings without proving Jurisdiction on the record, without dismissing the case when Petitioner files pleadings and the County Attorney doesn't answer, why Petitioner doesn't have discovery rights, why she violates the separation of powers by acting as a prosecutor by denying motions without the other side's answer or reply.

1.24 Further, Petitioner respectfully petitions this court to issue a writ of Mandate to the Justice Court #2 to continue the above entitled action until a Bill of Particulars identifying the jurisdiction, venue, nature and cause of the accusation so that Petitioner may mount a proper defense, attributed to the State, and to issue a mandate to the lower court and the County Attorney to produce Petitioners discovery and interrogatories, or as this case is ripe for dismissal, for cause shown in the exhibits and the facts stated herein, to issue a mandate on the lower court dismissing the above entitled case with prejudice, as prejudice has been clearly shown, or to issue a mandate to the Justice court compelling response to Petitioners request for

admissions, as authorities pled in exhibit M. Petitioner had no chance to reply, because Langston granted the denial without time for Petitioner to reply.

1.25 Further Petitioner filed an Affidavit of prejudice against Langston (attached hereto and filed as exhibit P and incorporated as fully stated herein,) and she needs to be barred from presiding over any of the proceedings in the above entitled case.

1.26 Petitioner Assures the two pleadings from the County Attorney, is everything in the court record Accept the unsigned, unverified police report, which states, Petitioner was compelled to relinquish his signature, photo's and monies under threat of jail (Exhibit Q). The custodial interrogation video being suppressed from Petitioner, asked for in discovery, and that Petitioner has firsthand knowledge and confirmed by the arresting officer that the video was on and we were being recorded, will show that Petitioner was forced under threat duress and the fear of going to jail, to make contracts with the state, and the Motor Vehicle Division, and cash only bond.

1.27 Petitioner has received a response of another pleading on the 29th day of April 2010, from the County Attorney; unfortunately Petitioner does not have a copy in his possession to present to this court. Attached here to and marked as exhibit R, are various affidavits and a letter written to Stormy Langston, that Petitioner filed in the above titled case.

1.28 Petitioner prays, that he has made a compelling case for this Court to hear, and grant all or in part the relief requested, or what is just, right and fair in the interest of Justice. Petitioner assures that he comes before this court in good faith and believes that his pleadings and theory of law are not frivolous, and has presented to the County Attorney and the Justice Court what he has researched and made known to him through such. Please excuse any unprofessionalism in this document as Petitioner is not a learned council and has written this document in an emergency for hearing set for May 4th 2010.

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II. VERIFICATION.

2.1 I, Stephen Mocko, do hereby declare under penalties of perjury that this petition for a writ of prohibition or in the alternative writ of mandate is made in good faith and that I am competent to testify in the matters stated above.

Stephen Mocko, Affiant

2.2 The above affirmation was subscribed and duly sworn to before me this 30th day of April, 2010, by Stephen Mocko.

2.3 I, Joni Pancoast, am a Notary under license from the State of Montana whose Commission expires 6/21/2011, and be it known by my hand and my Seal as follows:

Joni Pancoast

Notary signature

JONI PANCOAST
NOTARY PUBLIC for the
State of Montana
Residing at Helena, Montana
My Commission Expires
[illegible] 21, 2011

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CERTIFICATE OF SERVICE

I hereby certify that I served true and accurate copies of the foregoing WRIT ..... by depositing said copies into the U.S. mail, postage prepaid, addressed to the following:

Attorney for ..... Justice Court #2 County Attorney
(address) ..... P.o Box 403 512 California Ave.
Eureka MT 59917 Libby MT, 59923

DATED this 30 day of April 2010

(signature)